United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: October 26, 1998

TO : Robert H. Miller, Regional Director
Region 20

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: UCSF-Stanford Health Care
Case 20-CA-28435-2

177-1667
177-1683-5000
420-2310
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This Section 8(a)(5) and (1) case was submitted for advice as to (1) whether the Board has jurisdiction over the Employer; and (2) whether the Employer is a successor employer to the University of California and, if so, whether it violated Section 8(a)(5) of the Act by refusing to recognize and bargain with the Union as the exclusive representative of its employees in two bargaining units.[1]

FACTS

The Employer is a California non-profit public-benefit corporation organized in November 1997 by the University of California (UC), a state entity not subject to the Board's jurisdiction, and Stanford University (Stanford), a private university, for the purpose of operating the acute care and specialty hospitals and associated clinics owned by UC and Stanford. The hospitals operated by the Employer include the Moffitt-Long and Mt. Zion Hospitals in San Francisco, the Stanford Hospital in Stanford and the Lucile Packard Children's Hospital in Palo Alto. The San Francisco hospitals were part of the University of California at San Francisco (UCSF), which is part of the UC system.

The Employer's articles of incorporation and bylaws state that the Employer has two members -- the regents of UC and the board of trustees of Stanford. Although the bylaws reserve certain powers to the members, the Employer is directed primarily by its 17-member board. The board is

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[1] The issue of whether Section 10(j) injunction proceedings are warranted will be addressed in a separate memorandum.

composed of six directors from UC, six from Stanford, two (appointed by the board) who are officers of the Employer and three "outside independent directors." A majority of the serving directors constitute a quorum, and a vote of nine of the directors is required to decide questions.

The Employer has none of the extraordinary powers associated with governmental agencies, such as eminent domain or taxation. Like other acute care hospitals in California, the Employer is licensed by and subject to state regulation. The Employer is also subject to California Senate Bill 1350 (the Bill) which requires non-profit corporations integrating privately owned and state-owned health care facilities to publicly disclose certain information about their operations.[2] Although the Bill requires the Employer generally to open its meetings and to make certain records available to the public, the Bill contains various exemptions. Thus, the Employer may conduct "closed sessions" for certain matters, including collective bargaining,[3] and withhold certain documents (including collective bargaining records).[4] The language and legislative history of the Bill make clear that these requirements were not intended to result in "treating [covered] corporations as if they were state agencies...." Indeed, the Bill explicitly provides: "The Legislature finds and declares that a corporation subject to this chapter shall continue to be private ... and shall not be subject to the provisions of the Government Code or the Education Code made applicable to any public agency, or any public or constitutional corporation...."[5]

Prior to the creation of the Employer, the employees of UC and Stanford were represented by various labor organizations for collective bargaining. The UC employees at UCSF were part of larger system-wide bargaining units represented by four unions, including the University Professional and Technical Employees (UPTE or Union). UPTE represented employees in two system-wide units at UC -- a

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[2] See Senate Bill 1350, §1(d).

[3] Id., Art. 2, §101864.

[4] Id., Art. 4, §101872.

[5] Id., Art. 6, §101880.

unit of health care professionals other than doctors and nurses (the "HX Unit") and a unit of non-patient care technical employees (the "TX Unit").[6]

On December 1, 1994, the California Public Employment Relations Board (PERB)[7] certified UPTE to represent the TX Unit employees. The TX Unit contained about 180 job classifications, including computer operators, translators, firefighters, television engineers, glass blowers and accelerator operators.[8] UPTE and UC entered into their first collective-bargaining agreement covering the TX Unit on September 1, 1997. PERB certified UPTE to represent the HX Unit employees on September 18, 1997. This Unit consisted of approximately 60 job classifications, including physical therapists, laboratory technicians and pharmacists.[9]

After learning of the anticipated merger of the UCSF and Stanford hospitals, UPTE and the other unions representing employees at UCSF filed a charge with PERB, alleging that UC failed and refused to provide information to the unions and bargain over the decision and the effects of the decision to subcontract bargaining unit work. In September 1996, PERB issued a complaint against UC; a hearing is pending.

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[6] The patient care technical employees were in a separate unit represented by another union.

[7] UC is a political subdivision of the State of California and is subject to the California Higher Education Employment Relations Act (HEERA)(Cal. Govt. Code Section 3560 et seq.). As the agency administering HEERA, PERB determines appropriate units, conducts and certifies the results of elections, and adjudicates unfair labor practice charges.

[8] The system-wide TX Unit contained about 4,000 employees when UPTE was certified. Approximately 320 of them (in about 20-30 job classifications) worked at the UCSF hospitals and associated clinics.

[9] According to the Employer, the system-wide HX Unit contained about 500-1,000 employees when UPTE was certified. The Union contends that the system-wide HX Unit contained about 2,000 employees, including 680-700 employees working at the UCSF facilities.

When the Employer began operating in November 1997, it hired most of the former employees of the UCSF and Stanford hospitals.[10] About 11,000 employees work for the Employer among its four hospitals and various clinics, including 100-200 who had been part of the UC system-wide HX Unit[11] and 30-40 who had been part of the UC system-wide TX Unit.

After the transfer, the Employer assumed the operation of the UC and Stanford facilities. The former UC and Stanford employees continued to work at their same facilities, perform their same jobs, and generally report to their same supervisors. The physical facilities of UCSF and Stanford remain separate, and there is no evidence of any employee interchange between the facilities.

The Employer has refused to recognize UPTE as representing the TX and HX Units. On October 28, 1997, the Employer initially offered to recognize UPTE as the representative of the TX Unit employees. UPTE responded on October 30 that it was considering the Employer's offer of recognition in the TX Unit and that it was also demanding recognition as to the HX Unit. On December 9, 1997, the Union requested information from the Employer regarding the TX Unit, as well as an explanation of why the Employer would not recognize it in connection with the HX Unit. The Employer responded in a December 18 letter that the HX Unit was "not an appropriate unit for collective bargaining under NLRB standards for bargaining in the health care industry in that it does not include all professional employees other than physicians and nurses, and may include employees who are not professional employees under NLRB criteria." On January 6, 1998, the Employer withdrew its earlier recognition offer for the TX Unit, claiming that the TX Unit was "not appropriate for purposes of collective bargaining under the [NLRB] standards for appropriate bargaining units in the health care industry."

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[10] UC retained and leased to the new Employer certain employees at UCSF who met a formula based on age and years of service so that those employees could retain their coverage by UC's retirement plan. The instant charge does not involve those leased employees.

[11] According to the Union, the Employer hired about 240-250 employees (in most of the job classifications) who had been part of the system-wide HX Unit.

Shortly after the Employer assumed operations in November, UPTE and the other unions moved to amend the PERB complaint to allege that the Employer acted jointly with UC (as a joint employer or, alternatively, as a single employer), to transfer work out of the bargaining units without first bargaining over that decision. On February 24, 1998, a PERB ALJ denied the unions' motion to amend the complaint. The ALJ found, *inter alia*, that the Employer was not under PERB's jurisdiction but rather was a private entity subject to the NLRA. An appeal by the unions of the ALJ's order is pending before PERB.

In this NLRB charge, UPTE alleges that the Employer violated Section 8(a)(5) and (1) by withdrawing recognition from and refusing to recognize it as representing the HX and TX Unit employees.

ACTION

We conclude that the Employer is not a "state or political subdivision" exempt from the Board's jurisdiction under Section 2(2) of the Act. We further conclude that the Employer is a Burns[12] successor and that it violated Section 8(a)(5) and (1) by refusing to recognize and bargain with the Union as the exclusive representative of its employees in the HX and TX Units.

I. JURISDICTIONAL ISSUES

The definition of "employer" in Section 2(2) of the Act excludes any state or political subdivision. In NLRB v. Natural Gas Utility District of Hawkins County,[13] the Supreme Court limited the political subdivision exemption to entities that are either: (1) created by the state so as to constitute departments or administrative arms of the government; or (2) administered by individuals who are responsible to public officials or to the general electorate.

This Employer was not created directly by the State of California. The Employer is a nonprofit corporation that

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[12] NLRB v. Burns International Security Services, Inc., 406 U.S. 272, 80 LRRM 2225 (1972).

[13] 402 U.S. 600, 77 LRRM 2348 (1971).

was organized under its own bylaws. Nor does it have the characteristics of a department or arm of the state government, even though as a non-profit entity it is exempt from federal taxation and is also subject to some state information-disclosure requirements of the type often associated with public entities. The non-profit nature of the organization clearly is not inconsistent with Board jurisdiction.[14] The Employer's statutorily mandated obligations to disclose information and hold meetings are merely factors to be weighed in determining whether the entity is, in essence, a governmental body. In this regard, the language and legislative history of the California law show that the state, in subjecting the Employer to those requirements, specifically intended not to treat it as a state agency. Thus, the Employer does not meet the first part of the Hawkins County test.

The second prong of the Hawkins County test requires that the employer be "administered by individuals who are responsible to public officials or to the general electorate."[15] Under Hawkins County, the Board has found entities to be exempt only where a *majority* of an entity's board members meet this test.[16] As UC directly appoints or controls only six seats on the 17-member board, the Employer fails to meet the second prong of the Hawkins County test.

We thus conclude that the Employer is not exempt from Board jurisdiction as a "state or political subdivision."

Moreover, for the reasons set forth by the Region in its Request for Advice, we agree that the pending interlocutory appeal to PERB, in which the Union claims the Employer is a political subdivision outside of NLRA jurisdiction, is baseless and does not impede going forward in this case. However, in the unlikely circumstance that PERB reverses its ALJ's decision and asserts jurisdiction

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[14] See, e.g., St. Paul Ramsey Medical Center, 291 NLRB 755 (1988).

[15] 402 U.S. at 604-605.

[16] See Enrichment Services Program, Inc., 325 NLRB No. 154, slip op. at 2 (1998), citing Jefferson County Community Center v. NLRB, 732 F.2d 122, 126 (10th Cir. 1984).

over the Employer, the Region should promptly notify Advice and Special Litigation.[17]

II. SUCCESSORSHIP ISSUES

A. Application of general Burns principles

In determining whether an employer is a Burns successor, the focus is on whether there is "substantial continuity" between the enterprises and whether a majority of the employees of the new employer in the appropriate unit had been employed by the predecessor.[18] The Board examines the totality of the circumstances of the transfer, including whether there is continuity of the business operation, plant, workforce, working conditions, supervision, etc.[19] The Board views these factors from the employees' perspective, i.e., focusing on whether they would view their job situations as essentially unchanged.[20]

We agree with the Region that the Employer has maintained substantial continuity in the employing enterprise. The Employer assumed operation of the assets and enterprise of UC without interruption or change. The former UC employees are performing the same jobs at the same locations and under the same supervisors, and constitute a majority of the Employer's unit workforces. Thus, the employees have experienced no change in their jobs.

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[17] Similarly, the Region should promptly notify Advice if any PERB remedial order, in the complaint litigating UC's failure to bargain with the Union over the decision and effects of the merger decision, affects any obligations the Employer and Union may have under the NLRA.

[18] Burns International Security Services, 406 U.S. at 280-281.

[19] Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27, 43 (1987) (citations omitted). See also Morton Development Corp., 299 NLRB 649, 650 (1990).

[20] Fall River Dyeing and Finishing Corp. v. NLRB, 482 U.S. at 43, citing Golden State Bottling Co. v. NLRB, 414 U.S. 168, 184 (1973), and NLRB v. Jeffries Lithograph Co., 752 F.2d 459, 464 (9th Cir. 1985); Capitol Steel & Iron Co., 299 NLRB 484, 486 (1990).

The Employer argues that that there is no continuity in the employing enterprise because: (1) UC was under PERB's jurisdiction while the Employer is subject to the NLRA; (2) the Employer is smaller than UC; and (3) UC operates in fields related to higher education while the Employer operates only acute health care facilities. The Employer specifically relies on Atlantic Technical Services Corp.,[21] a factually unique case that is clearly distinguishable from the present case.

In Atlantic Technical, the Board found no successorship where the alleged successor took over a tiny portion of what had previously been a Trans World Airlines company-wide mechanics' unit of approximately 14,000 employees. Approximately 1100 of the TWA mechanics and machinists, plus 41 mail handlers who had been accreted into the overall unit, worked at the Kennedy Space Center. The alleged successor took over the mail and distribution services contract at Kennedy and hired approximately 27 of the 41 employees who had performed this work for TWA. In addition to the extreme reduction of the unit's scope, the Board noted that TWA was a large company, was regulated under the Railway Labor Act, and was engaged primarily in transportation and related fields with contracts throughout the country. The alleged successor, in contrast, was a small organization having only one contract. In finding no successorship, the Board emphasized that there had been no showing of majority pro-union sentiment among the employees in the accreted mail handlers unit. 202 NLRB at 170.

By contrast, and of particular importance, this case involves no accretion or doubt about the Union's majority status among retained employees.[22] Moreover, unlike Atlantic Technical, the diminution of unit scope in this case is insufficient to meaningfully affect how employees view their job situations or union representation. It is well established that a successor's bargaining obligations are not defeated by the "mere fact that only a portion of a

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[21] 202 NLRB 169 (1973), enfd. 498 F.2d 680, 86 LRRM 2182 (D.C. Cir. 1974).

[22] Similarly distinguishing Atlantic Technical on this basis are Bronx Health Plan, 326 NLRB No. 68, slip op. p. 4 (August 27, 1998) and M.S. Management Associates, Inc., 325 NLRB No. 217, slip op. p. 3, (July 22, 1998).

former union-represented operation is subject to a sale or transfer to a new owner so long as the unit employees in the conveyed portion constitute a separate appropriate unit and comprise a majority of the unit under the new operation."[23]

Moreover, the fact that the predecessor is a public entity subject to PERB rather than Board jurisdiction does not preclude successorship if the other indicia of successorship are present.[24]

B. Appropriateness of the TX and HX Units

The bargaining obligation of a successor depends on whether the former unit employees of the predecessor employer still constitute an appropriate unit for the successor.[25] We conclude that the TX and HX Units remain appropriate in this case.

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[23] Bronx Health Plan, 326 NLRB No. 68, slip op. at 3. See also M.S. Management Associates, 325 NLRB No. 217, slip op. at 2; Capitol Steel & Iron Co., 299 NLRB 484, 487 (1990); CitiSteel USA, 312 NLRB 815 (1993), enf. den. 53 F.3d 350, 149 LRRM 2196 (D.C. Cir. 1995).

[24] See JMM Operational Services, 316 NLRB 6, 12-13 (1995) (private employer that contracted to operate city wastewater treatment plant found a Burns successor under Board's traditional successorship test); Lincoln Park Zoological Society, 322 NLRB 263, 265 (1996), enfd. 116 F.3d 216 (7th Cir. 1997) (successorship status imposed on private corporation that obtained contract to operate zoo that continued to be owned by city park district). Cf. The Boeing Company, 214 NLRB 541, 541, 559 (1974) (ALJ's finding replacement aerospace contractor was not required to bargain over initial employment terms affirmed solely under Spruce-Up analysis, leaving undisturbed ALJ's analysis that predecessor's employees being part of a nationwide bargaining unit subject to Railway Labor Act did not itself preclude application of Burns principles); Bronx Health Plan, 326 NLRB slip op. at 4, n. 11 ("[I]n determining whether there has been a successorship, nothing in Atlantic Technical indicates that units established under the Railway Labor Act are to be treated differently from units established under the NLRA.").

[25] See, e.g., Irwin Industries, 304 NLRB 78, 79 (1991) (no successorship found where employees acquired from

1. The Board's Health Care Rule

The Employer argues that the TX and HX Units are inappropriate under the Board's Rule on collective-bargaining units in the health care industry.[26] According to the Employer, the TX Unit (non-patient care technical employees) is inappropriate because it excludes a large group of technical employees in patient care classifications, rather than consisting of "all technical employees" as would be appropriate under the Health Care Rule. Similarly, the Employer contends that the HX Unit is inappropriate in that it fails to include "all professionals except for registered nurses and physicians" as set forth in the rule.[27]

We agree with the Region that the Health Care Rule does not apply in this case.[28] That rule applies only to initial petitions for recognition under Section 9(c) of the Act.[29]

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predecessor did not clearly constitute an appropriate unit on their own).

[26] 29 CFR Part 103.30, 54 Fed. Reg. 16336, 284 NLRB 1580, 1596-97 (1989). This rule was approved by the Supreme Court in American Hospital Assn. v. NLRB, 499 U.S. 606, 111 S.Ct. 1539 (1991).

[27] In addition to the exclusion of non-health care professional employees, the Employer contends that the HX Unit does not include a number of health care professionals such as physical therapists and optometrists.

[28] The Region noted that the parties have not submitted sufficient information for the Region to resolve the question of whether the Employer is an "acute care hospital" subject to the Health Care Rule, in light of the Employer's operation of numerous clinics and research labs. The Region has assumed that the Employer is an "acute care hospital." If, in fact, the Region concludes that the Employer is not an "acute care hospital," the Health Care Rule would not apply for that reason as well.

[29] See 29 CFR Section 103.30(a); Kaiser Foundation Hospitals, 312 NLRB 933, 934. See also Pathology Institute, 320 NLRB 1050 (1996), enfd. 116 F.3d 482, 156 LRRM 3184 (9th Cir. 1997).

Therefore, the appropriate unit issue must be decided under traditional representation principles.[30]

2. Traditional representation principles

In Trident Seafoods,[31] the Board reiterated its long-standing policy that "a mere change in ownership should not uproot bargaining units that have enjoyed a history of collective bargaining unless the units no longer conform reasonably well to other standards of appropriateness."[32] The Board went on to state that the party challenging a historical unit bears a heavy burden of showing that the unit is "*no longer* appropriate" (emphasis added).[33] Thus, the Board presumes that an existing bargaining unit continues to be appropriate through a mere change in ownership. Indeed, the Board has expressed a reluctance to uproot bargaining units based on a change in ownership unless the bargaining units are "repugnant to Board policy"[34] or there are other "compelling circumstances."[35]

In the instant case, the Employer claims both the HX and TX Units are inappropriate. It contends the HX Unit is inappropriate because it consists of only a fragment of the professional employees acquired by the Employer from UC. The Unit excludes all non-health care employees, and

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[30] Pathology Institute, 320 NLRB at 1051. We further agree with the Region that even if that rule applied in unfair labor practice cases, traditional representation principles would still apply to this case because the subject Units would fall under the "existing non-conforming units" exception to the rule. Id.

[31] Trident Seafoods, Inc., 318 NLRB 738, 738 (1995), enfd. in rel. part 101 F.3d 111, 153 LRRM 2833 (D.C. Cir. 1996).

[32] Id., citing Indianapolis Mack Sales & Service, 288 NLRB 1123 fn. 5 (1988).

[33] Id., citations omitted.

[34] P. J. Dick Contracting, 290 NLRB 150, 151 (1988).

[35] See Children's Hospital, 312 NLRB 920, 929 (1993), enfd. 87 F.3d 304, 152 LRRM 2593 (9th Cir. 1996).

according to the Employer omits certain of the health care professionals.[36] In our view, the Employer's argument here misses the mark; the controlling question is not whether the Unit would satisfy the Health Care Rule. As discussed above, the Health Care Rule is inapplicable to this case. Moreover, there is no contention that the HX Unit employees lack a community of interest or that the Unit has undergone significant change.

The Employer also argues that the TX Unit is not a coherent unit appropriate for collective bargaining because its employees have virtually no community of interest. It notes the wide disparity among job classifications in the unit (ranging from senior artists to laboratory assistants) and the lack of common supervision or job contact among the employees. However, we note that PERB found a community of interest among the TX Unit employees for a number of reasons, including their being subject to a centralized personnel policy, classification scheme, and wage and benefits plan, as well as their sharing UC's basic teaching and research mission. There is no indication that the factors PERB relied on in finding a community of interest have changed so as to render the unit no longer appropriate, and there is no showing that these factors are repugnant to Board policy, as discussed above.

The Employer further argues that bargaining history should be given no weight in determining the appropriateness of the two units. The Employer contends that there is no bargaining history for the HX Unit, which had only recently been certified by PERB, and insufficient bargaining history for the TX Unit, which PERB certified in 1994. Reliance on the recent timing of a union's certification as a basis for denying representation where the only change in circumstances surrounding employment is a mere change in ownership would be to nullify the following clear principle stated in Burns:

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[36] Specifically, the Employer asserts that the HX Unit excludes physical therapists, optometrists, reading therapists and neurophisio-monitoring specialists. Contrary to the Employer's assertion, physical therapists and optometrists are job classifications included in the unit. The Region has not made a determination as to whether optometrists and neurophisio-monitoring specialists are professionals.

> ... [W]here a bargaining unit remains unchanged and a majority of the employees hired by the new employer are represented by a recently certified bargaining agent there is little basis for faulting the Board's implementation of the express mandates of §8(a)(5) and §9(a) by ordering the employer to bargain with the incumbent union.[37]

The Employer also contends that no weight should be given to the bargaining history because the Units were certified as appropriate under a California statute permitting units that would not have been found appropriate by the Board. The Employer relies on North Memorial Medical Center,[38] where the Board gave bargaining history less than controlling weight because the bargaining took place under a state statute that prohibited strikes and lockouts, allowed fragmented units and was generally inconsistent with the policy of the Act to discourage proliferation of bargaining units in the health care industry. In contrast to North Memorial, this case involves a state statute implemented as to these units with the specific goal in mind of avoiding undue proliferation of bargaining units. This, of course, is the precise goal Congress mandated for the Board in determining the appropriateness of a unit in the health care industry.[39] In finding the HX Unit appropriate, PERB explicitly noted that this Unit would "serve the statutory goal of avoiding impairment of the University's operational efficiency and avoid potential undue unit proliferation."

Lastly, the Employer argues that where the parties are different from those who established the bargaining history, the Board "does not give weight to bargaining history as a factor" in determining whether a unit is appropriate. The cases relied upon by the Employer, North Memorial[40] and St. Luke's Hospital,[41] however, stand only for the proposition that bargaining history, particularly where the identity of

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[37] Burns, 406 U.S. at 281.

[38] 224 NLRB 218 (1976).

[39] See, e.g., Kaiser Foundation Hospitals, 312 NLRB at 935.

[40] 224 NLRB at 219-220.

[41] 274 NLRB 1431, 1432 (1985).

the bargaining parties has changed, should not be given *controlling* weight.[42] Moreover, those cases did not involve successorship situations; they involved changes in the bargaining representative. The Board gives substantial weight to bargaining history in successorship cases, which by their nature always involve some change in the identity of the bargaining parties.[43]

In sum, we conclude that the arguments raised against the appropriateness of the HX Unit fail because they essentially rely entirely on the applicability of the Health Care Rule to the instant case. Similarly, one of the arguments raised against the TX Unit (its exclusion of all of the patient-care technical employees) also rests on the applicability of the Health Care Rule and fails for that reason. We further conclude that the Employer has failed to show "compelling circumstances" or repugnancy of the Units to the policies of the Act, or that these Units are otherwise no longer appropriate.

III. ADEQUACY OF DEMAND FOR RECOGNITION

Finally, for the reasons given in its Request for Advice, pp. 12-13, we agree with the Region's conclusion that the Union made proper demands for recognition in both the TX and HX Units.

IV. CONCLUSION

Accordingly, complaint should issue, absent settlement, alleging that the Employer violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union in each of the two units.

B.J.K.

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[42] St. Luke's Hospital, 274 NLRB at 1432; North Memorial, 224 NLRB at 219-220.

[43] See, e.g., Children's Hospital, 312 NLRB at 929.